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No. 15-105

IN THE

Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER COLORADO, *et al.*,

Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICI CURIAE CHRISTIAN LEGAL SOCIETY, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, THE LUTHERAN CHURCH—MISSOURI SYNOD, AND THE INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Did the Tenth Circuit misconstrue the substantial burden test under the Religious Freedom Restoration Act?

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INTEREST OF THE AMICI CURIAE[1]

The Christian Legal Society (CLS) is a nonprofit, nondenominational association of Christian attorneys,

[1] No counsel for a party authored this brief in whole or in part or made a monetary contribution to the preparation or submission of this brief. Letters of consent from both parties are on file with the Clerk.

law students, and law professors with chapters in nearly every state and on many law school campuses. CLS's legal advocacy division, the Center for Law and Religious Freedom, acts to protect all citizens' right to be free to exercise their religious beliefs.

The Association of Christian Schools International is a nonprofit, nondenominational, religious association providing support services to 24,000 Christian schools in over 100 countries.

The Lutheran Church—Missouri Synod, a Missouri nonprofit corporation, has approximately 6,150 member congregations that, in turn, have approximately 2,400,000 baptized members.

The Institutional Religious Freedom Alliance works with a multi-faith network of organizations to protect the religious freedom of faith-based service organizations by educating the public, training organizations and their lawyers, creating policy alternatives that better protect religious freedom, and advocating to the federal administration and Congress.

The resolution of the questions presented in this case is of substantial importance to amici, who share a commitment to religious liberty, not just for themselves and their respective constituents, but for Americans of all faith traditions. While amici may differ in their views regarding whether the general use of contraceptives is acceptable or whether certain contraceptives act as abortion-inducing drugs, amici agree that the nation's historic, bipartisan commitment to religious liberty requires that the government respect the religious beliefs of those faith traditions whose religious beliefs prohibit participating in the use or provision of abortion-inducing contraceptives. Amici write in support of the petition because they believe that the

Health and Human Services contraceptive mandate's so-called "accommodation scheme" does not offer adequate protection of religious liberty.

Beyond the specific contraceptive issue presented in this case, amici are also gravely concerned about the Tenth Circuit's approach to resolving the religious liberty issue presented in this case. Under the guise of evaluating whether the regulations at issue imposed a substantial burden on Petitioners' exercise of their religious faith, the Court of Appeals in fact evaluated the religious reasoning that leads Petitioners to believe that the HHS accommodation scheme renders them complicit in the provision of contraceptives in contravention of their faith. The religious reasoning underlying Petitioners' belief is, however, beyond the competence or purview of the courts to review. Amici are concerned that the Tenth Circuit's interpretation of the Religious Freedom Restoration Act (RFRA) as allowing courts to review religious reasoning and beliefs could have far-reaching and detrimental consequences for religious liberty.

SUMMARY OF ARGUMENT

Religious liberty in our constitutional tradition means that "all persons have the right to believe or strive to believe in a divine creator and a divine law." *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). But religious liberty means much more than that. By their terms, both our Constitution and RFRA protect the right of the individual to "exercise" his or her religious beliefs free from government interference. U.S. Const. amend. I; 42 U.S.C. § 2000bb-1(a). Religious liberty protects the individual's "right to express [her] beliefs and to establish [her] religious (or nonreligious) self-

definition in the political, civic, and economic life of our larger community." *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring). The Court should grant certiorari in this case because the decision below contradicts the Court's prior decisions concerning religious liberty and because of the potential impact of the Tenth Circuit's decision—and, as importantly, its analysis—on the religious exercise of tens of millions of Americans.

First, the Tenth Circuit applied a flawed test to evaluate whether the Affordable Care Act (ACA), as implemented by HHS, imposes a substantial burden on Petitioners' religious exercise under this Court's precedents. The Tenth Circuit appeared to afford exceptional deference to the regulations at issue because they are styled an "accommodation." HHS regulations enacted under the ACA require, as a general rule, that group health plans provide coverage for all FDA-approved contraceptive methods and sterilization procedures without cost sharing. HHS regulations purport to provide an "accommodation" allowing certain religious organizations that object to the provision of such contraceptives and procedures to "comply" with the mandate by other means. Petitioners object, on sincerely held religious grounds, to providing health insurance that offers certain of these contraceptives and procedures *and* to taking the actions required to avail themselves of the "accommodation," believing that each option makes them morally complicit in the provision of contraceptives in contravention of their religious beliefs.

The Tenth Circuit, while purportedly evaluating whether the challenged regulations work a substantial burden on Petitioners' religious beliefs, in fact reviewed Petitioners' religious reasoning and the correctness of their religious belief that acting pursuant to

the HHS regulatory "accommodation" scheme would make them morally complicit in the provision of contraceptives. The Tenth Circuit ruled that Petitioners, by taking advantage of the accommodation scheme, would not be morally complicit in the provision of contraceptives (Pet. App. 48a & n.20)—as if courts have any competence to evaluate moral complicity.

In fact, this Court's decisions expressly disclaim any judicial role in making such evaluations, either under the First Amendment or RFRA. "[I]t is not within the judicial function and judicial competence to inquire whether" someone who has religious qualms with a law has "correctly perceived the commands of [his] ... faith." *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981). Rather, this Court's decisions confine judicial review of whether an adherent's religious beliefs prohibit compliance with government regulation to the "'narrow function'" of inquiring whether those beliefs "reflect[] 'an honest conviction.'" *Hobby Lobby*, 134 S. Ct. at 2779. In other words, the adherent alone defines the tenets of his or her religious observance; there is no proper role for court review of the reasoning underlying a sincerely held religious belief. Even religious reasoning or beliefs that reasonable observers would view as suspect are entitled to protection if sincerely held. *Id.* at 2778 ("'Repeatedly and in many different contexts, we have warned that courts must not presume to determine ... the plausibility of a religious claim[.]'" (quoting *Employment Div., Dep't of Human Res. of Or.* v. *Smith*, 494 U.S. 872, 887 (1990)).

Once a court determines that a party sincerely believes, reasonably or not, that taking the action the government requires or failing to take the action that the government forbids is contrary to his or her religious beliefs, the only burden question for the court is

whether a substantial governmental sanction attaches to disobedience of the law. If so, and if all means of avoiding a substantial government penalty conflict with that religious belief, the substantial burden inquiry is at an end.

The Tenth Circuit improperly inquired into the validity of Petitioners' belief under the guise of a substantial burden analysis. While acknowledging Petitioners' undisputedly sincere belief that both of the options afforded by HHS regulations to comply with the ACA mandate would make them morally complicit in the provision of contraceptives contrary to their faith, the Tenth Circuit examined at length whether that belief is correct as a matter of law—and held that it is not. Pet. App. 48a & n.20. In effect, the court inquired into whether Petitioners' *belief* is reasonable, rather than whether *the burden placed on that belief* is substantial. In so doing, the Tenth Circuit moved from the role of legal arbiter to that of moral philosopher, and thus moved from a role of constitutional necessity to one of constitutional incompetence. This was improper. It is not for the Tenth Circuit "to say that the [religious] line" Petitioners drew "was an unreasonable one." *Thomas*, 450 U.S. at 715.

The Tenth Circuit's substantial burden analysis also improperly focused on the incidental administrative burden of participating in the accommodation scheme, in violation of Petitioners' beliefs. Rather than evaluate the substantial financial penalties the government placed on Petitioners' *adherence* to their religious belief, the court instead measured the ease with which Petitioners could *violate* that belief by participating in the accommodation scheme. This is not the inquiry RFRA requires. To the contrary, "the question that RFRA presents" is whether the challenged govern-

ment action "imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with their religious beliefs." *Hobby Lobby*, 134 S. Ct. at 2778 (emphasis omitted).

Second, it is critical that this Court clarify that "accommodations" must be evaluated the same way as other laws challenged under RFRA, using the correct substantial burden test. If allowed to stand, the modified substantial burden analysis employed by the Tenth Circuit could incentivize regulators to add "accommodations" that do not actually accommodate the exercise of sincerely held religious beliefs. This country has a longstanding tradition of providing robust religious exemptions. *Infra* part II.B. Accommodations-in-name-only would undermine the important historical interests in protecting religious liberty that have been recognized by Congress and this Court.

ARGUMENT

I. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S SUBSTANTIAL BURDEN PRECEDENTS

A. The Tenth Circuit Departed From This Court's RFRA Precedents By Unduly Deferring To HHS's Characterization Of The Relevant Provision As An "Accommodation"

Substantial burden on a party's religious exercise is evaluated on the basis of the party's own sincerely held religious belief. *E.g.*, *Hobby Lobby*, 134 S. Ct. at 2778. This Court has repeatedly stated that "it is not for us to say" whether a party's religious beliefs "are mistaken or insubstantial." *Id.* at 2779. When a party determines that certain conduct violates its religious beliefs, a court's "'narrow function ... is to determine' whether the line drawn 'reflects an honest conviction.'" *Id.*

The Little Sisters genuinely believe that utilizing the "accommodation" provided by HHS would make them complicit in sin, give the appearance of involvement in sin, and grievously impair their ability to bear witness to the sanctity of human life. That HHS has seen fit to label this procedure as an "accommodation" changes nothing. Nowhere in this Court's prior decisions does the "'narrow function'" of judicial review of religious convictions widen based on whether a party's conviction relates to a law of general applicability or to a regulation that an agency has labelled an "accommodation." *See Hobby Lobby*, 134 S. Ct. at 2779.

Nevertheless, the Tenth Circuit evaluated the accommodation differently from a direct regulation in two ways. *First*, it evaluated the burden of the accommodation *in relation to* the contraceptive mandate, as opposed to evaluating the accommodation in its own right. The Tenth Circuit cited no authority for its assertion that, "[w]hen, as here, plaintiffs are offered an accommodation to a law or policy that would otherwise constitute a substantial burden, we must analyze whether the accommodation renders the potential burden on religious exercise insubstantial or nonexistent such that the law or policy that includes the accommodation satisfies RFRA." Pet. App. 57a. The majority then concluded that the accommodation "eliminates burdens Plaintiffs otherwise would face" (*id.* 60a), and that the "opt out ... relieves objectors of their coverage responsibility" (*id.* 68a)—all to demonstrate that the religious violation that results from the HHS regulations is supposedly *less severe* under the accommodation than by compliance with the contraceptive mandate itself. But whether complying with the accommodation is *less objectionable* than the contraceptive mandate is not the

correct test of substantial burden. *See Hobby Lobby*, 134 S. Ct. at 2778-2779.

Second, the majority placed great weight on the fact that the accommodation was purportedly designed to "reconcile religious liberty with the rule of law" and "to permit the religious objector both to avoid a religious burden and to comply with the law." Pet. App. 73a, 74a. Instead of evaluating the accommodation like any other law, the Tenth Circuit set the accommodation apart, to be evaluated under a new and different standard: whether it "reconciled with religious objections" the "legislative policy choice ... to afford women contraceptive coverage." *Id.* 75a. Based on this erroneous understanding that an accommodation substitutes for RFRA itself, the majority discounted the possibility of a religious objector disobeying a religiously objectionable accommodation. *Id.* 74a. The Tenth Circuit thus refused to engage in a traditional substantial burden analysis, asserting that Petitioners have no right to "stymie coverage to their employees by breaking the law," but instead stated, if they "wish to avail themselves of a legal means—an accommodation—to be excused from compliance with a law, they cannot rely on the possibility of their violating that very same law to challenge the accommodation." *Id.* But this Court held in *Hobby Lobby* that the government cannot force the Petitioners to obey a religiously objectionable law; Petitioners may indeed "rely" on "violating" the accommodation in challenging it under RFRA. *Id.*

The Tenth Circuit points to scant precedent to support treating accommodations differently and in the case it does cite, *Hobby Lobby*, this Court noted that it was *not* deciding whether the accommodation approach complies with RFRA for purposes of all religious claims. 134 S. Ct. at 2782. Although the court below

suggested that the presence of the accommodation relieves Petitioners' religious concerns (Pet. App. 17a), an accommodation is not by definition inoffensive to religious belief or immune from imposing a substantial burden. *See* 42 U.S.C. § 2000bb-3(a) ("This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise[.]"); *United States* v. *Friday*, 525 F.3d 938, 947-948 (10th Cir. 2008) (suggesting that a permit process that purports to accommodate religion could be religiously objectionable and found to be a substantial burden, but claimant did not make this argument); *Beerheide* v. *Suthers*, 286 F.3d 1179, 1186-1187 (10th Cir. 2002) (rejecting non-kosher, vegetarian meals for Orthodox Jewish inmates as an accommodation of kosher diet). Nor is it material that the accommodation is provided by the government as an alternative to another burdensome procedure (providing contraceptive and abortifacient care) that also violates Petitioners' religion.

To the contrary, following the logic of this Court's precedents leads to the opposite conclusion: it is for the party alone to define the tenets of its religious observance. *Smith*, 494 U.S. at 887 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."). Regardless of whether HHS has provided an alternative "accommodation" procedure—or a dozen alternative procedures, or no alternative at all—all avenues currently provided by HHS to avoid penalty violate Petitioners' sincerely held religious beliefs. This Court's precedents neither require more of a showing by Petitioners nor allow more analysis by the courts concerning the inconsistency of the law with Petitioners' conscience. *Hobby Lobby*, 134 S. Ct. at 2778-2779;

Smith, 494 U.S. at 887; *Hernandez* v. *Commissioner*, 490 U.S. 680, 699 (1989); *Thomas*, 450 U.S. at 715.

B. The Tenth Circuit Misconstrued The Substantial Burden Test

The Tenth Circuit asked two improper questions in weighing the accommodation scheme's burden on Petitioners' religious beliefs. *First*, the Tenth Circuit improperly evaluated the verity—as opposed to the sincerity—of Petitioners' belief that participating in the accommodation scheme would violate their religion. *Second*, the Tenth Circuit only considered the small administrative burden of participating in the accommodation scheme and violating those beliefs—not the massive financial penalties for refusing to participate, in accordance with those beliefs.

1. The Tenth Circuit improperly inquired into the validity of Petitioners' belief under the guise of a substantial burden analysis

The Little Sisters believe that participating in either the contraceptive mandate or the accommodation scheme is morally wrong, as either would make them morally complicit in the provision of contraception and abortifacients, in violation of the teachings of the Catholic Church. That Petitioners' belief is sincere is undisputed. Therefore, according to the Tenth Circuit's own reasoning, the analysis should have moved directly to "'the intensity of the coercion applied by the government to act contrary to those beliefs.'" Pet. App. 55a (quoting *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114, 1137 (10th Cir. 2013)); *see also id.* ("'Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief.'").

Rather than take Petitioners' undisputedly sincere belief at face value, however, the Tenth Circuit went on to examine whether that belief is correct *as a matter of law*—and held that it is not. Pet. App. 48a & n.20. In so doing, it effectively inquired into whether Petitioners' *belief* is substantiated, rather than whether *the burden placed on that belief* is substantial. This is something RFRA does not empower the court to do—indeed, it is antithetical to the very purpose of the law.

This Court's recent decision in *Hobby Lobby* is instructive on this point. In similar circumstances to this case, this Court rejected HHS's argument "that the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception ...) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated" to sustain a finding of substantial burden on Petitioners' religious beliefs. *Hobby Lobby*, 134 S. Ct. at 2777. That line of reasoning, the Court said, "addresses a very different question" than the one posed by a substantial burden analysis, one "that the federal courts have no business addressing[:] whether the religious belief asserted ... is reasonable." *Id.* at 2778. Petitioners believed that complying with the mandate "is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them" to comply. *Id.* The Court compared the plaintiffs' causal line-drawing to that in *Thomas*, where the plaintiff believed he could work making steel used in weapons, but not making weapons themselves, and where "[t]his Court ... held that 'it is not for us to say that the line he drew was an unreasonable one.'" *Id.* at 2778 (quoting *Thomas*, 450 U.S. at 715).

Similarly, Petitioners have drawn a line. On the objectionable side of that line is providing contracep-

tive and abortifacient care to employees. *Also* on the objectionable side of that line are signing a document that Petitioners believe makes them morally complicit in the provision of contraceptive and abortifacient care (its appellation as an "accommodation" notwithstanding), and being required to maintain a health plan that the government will commandeer to provide such care. On the other side of that line is a simple declaration that Petitioners object to providing contraceptive and abortifacient care on religious grounds. Such was the injunctive relief that this Court previously granted to Petitioners. The Tenth Circuit was not "convinc[ed]" that the accommodation lies on one side of the complicity line whereas this Court's injunctive relief lies on the other. Pet. App. 59a n. 25. But the persuasiveness of Petitioners' religious line-drawing to a majority of a panel of judges of the Tenth Circuit, or even of this Court, is irrelevant to RFRA's required analysis.

Petitioners' belief implicates the very same "difficult and important question of ... moral philosophy" as the petitioners' beliefs in *Hobby Lobby* and *Thomas*, "namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." *Hobby Lobby*, 134 S. Ct. at 2778. Petitioners here believe that submitting the accommodation form "is connected to the destruction of an embryo in a way that is sufficient to make it immoral." *Id.* The correctness of that belief is not reviewable by the courts. But rather than defer to that sincere belief as this Court did in *Thomas* and *Hobby Lobby*, *id.* at 2779 ("it is not for [the courts] to say that [petitioners'] religious beliefs are mistaken or insubstantial"), the Tenth Circuit analyzed whether the moral connection asserted by Petitioners is sufficient as

a matter of law, engaging in exactly the type of religious line-drawing this Court forbids.

The Tenth Circuit examined at length whether the accommodation form *legally causes* contraception coverage and concludes that it does not. Pet. App. 63a ("Plaintiffs' causation argument misconstrues the statutory and regulatory framework"); *id.* 68a ("The opt out does not 'cause' contraceptive coverage[.]"). That inquiry, however, is irrelevant in this context. Rather, the Tenth Circuit's "'narrow function ... in this context' is to determine whether the line drawn [by Petitioners] 'reflects an honest conviction,' and there is no dispute that it does." *Hobby Lobby*, 134 S. Ct. at 2779; *see also University of Notre Dame* v. *Sebelius*, 743 F.3d 547, 566 (7th Cir. 2014) (Flaum, J., dissenting) ("[W]e are judges, not moral philosophers or theologians; this is not a question of legal causation but of religious faith.").

The Tenth Circuit probed Petitioners' belief that, as a religious matter, participating in the accommodation scheme "would make them complicit" in the provision of contraception and found it "unconvincing." Pet. App. 85a. Again, as *Hobby Lobby* made clear, whether the Tenth Circuit is convinced by Petitioners' religious line-drawing is irrelevant. As this Court said in *Thomas*, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit ... protection." 450 U.S. at 714. They need only be sincere, and that is undisputed here.

In so scrutinizing the content of Petitioners' beliefs, the Tenth Circuit effectively "arrogat[ed] the authority ... [to] tell plaintiffs that their beliefs are flawed"—something this Court has "repeatedly refused" to do in *Hobby Lobby*, *Thomas*, and a long line of other cases. *See Hobby Lobby*, 134 S. Ct. at 2778 ("'Repeatedly and

in many different contexts, we have warned that courts must not presume to determine ... the plausibility of a religious claim.'" (quoting *Smith*, 494 U.S. at 887)); *Hernandez*, 490 U.S. at 699 ("It is not within the judicial ken to question ... the validity of particular litigants' interpretations of those creeds."); *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988) ("This Court cannot determine the truth of the underlying beliefs that led to the religious objections here[.]"); *Hobbie* v. *Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 144 n.9 (1987) ("courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs"); *United States* v. *Lee*, 455 U.S. 252, 257 (1982) ("It is not within the 'judicial function and judicial competence,' however, to determine whether appellee or the Government has the proper interpretation of the Amish faith. 'Courts are not arbiters of scriptural interpretation.'" (alteration omitted)).

Unfortunately, other Circuit Courts that have reviewed the accommodation scheme have committed the same error, despite this Court's clear precedent. *E.g.*, *Priests for Life* v. *HHS*, 2015 U.S. App. LEXIS 8326 (D.C. Cir. May 20, 2015); *Geneva Coll.* v. *HHS Sec'y*, 778 F.3d 422 (3d Cir. 2015); *East Tex. Baptist Univ.* v. *Burwell*, 2015 WL 3852811 (5th Cir. June 22, 2015); *Michigan Catholic Conf.* v. *Burwell*, 2015 WL 4979692 (6th Cir. Aug. 21, 2015); *University of Notre Dame* v. *Burwell*, 786 F.3d 606 (7th Cir. 2015). This Court's review is vital to ensure that other courts do not follow suit, interposing themselves between claimants and their religious beliefs.

2. The Tenth Circuit failed to consider the significant financial penalties for refusing to participate in the accommodation scheme

To the extent that the Tenth Circuit considered the burden placed on Petitioners' religious belief—rather than the belief's verity—it focused on the incidental administrative burden of participating in the accommodation scheme *in violation* of that belief. *E.g.*, Pet. App. 88a ("Plaintiffs' only involvement in the scheme is the act of opting out. Plaintiffs are not substantially burdened solely by the *de minimis* administrative tasks this involves."). Here again, the Tenth Circuit asked the wrong question.

As this Court stated in *Hobby Lobby*, "the question that RFRA presents" is whether the challenged government action "imposes a substantial burden on the ability of the objecting parties to conduct business *in accordance with* their religious beliefs." 134 S. Ct. at 2778 (emphasis added; other emphasis omitted). The key to that inquiry is the extent to which government action "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas*, 450 U.S. at 718; *see also* Pet. App. 55a (quoting *Hobby Lobby*, 723 F.3d at 1125-1126) ("'a government act imposes a "substantial burden" on religious exercise if it ... places substantial pressure on an adherent to engage in conduct contrary to a sincerely held religious belief'").

The Tenth Circuit's analysis turned this Court's substantial burden jurisprudence on its head. Rather than evaluate how large a burden the government places on Petitioners' *adherence* to their religious belief, it focused on how small a cost (in the government's eyes)

the government places on *violating* that belief by participating in the accommodation scheme.

In its recent decision in *Holt* v. *Hobbs*, this Court "easily" found that a policy requiring an inmate to shave his face substantially burdened his religious belief that he must grow a beard. 135 S. Ct. 853, 862 (2015) (evaluating substantial burden under RLUIPA). The Court did not focus on how easy it would be for the Petitioner to shave his beard, in violation of his religious beliefs, but on the "serious disciplinary action" he would face if he refused to do so, in accordance with those beliefs. *Id.* Similarly, in *Sherbert* v. *Verner*, 374 U.S. 398, 403-404 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205, 218 (1972)—the cases Congress enacted RFRA to restore, 42 U.S.C. § 2000bb(b)(1)—the Court weighed the denial of unemployment benefits and imposition of criminal sanctions imposed on claimants for adhering to their religious beliefs, not the incidental cost of working on Sunday or sending their children to school in violation of those beliefs, respectively.

In contrast, the Tenth Circuit fully ignored the substantial financial penalties Petitioners will face here if they adhere to their religious beliefs by participating in neither the contraceptive mandate nor the accommodation scheme. As this Court noted in *Hobby Lobby*, if the petitioners offered health plans that did not cover contraceptives, they would be taxed $100 a day for each affected individual; if the petitioners dropped insurance coverage and their employees qualified for a subsidy on a government-run exchange, the petitioners could face penalties of $2,000 per employee per year. 134 S. Ct. at 2775-2776 (citing 26 U.S.C. §§ 4980D, 4980H). Faced with such penalties, this Court had "little trouble concluding" that the petitioners' religious beliefs were substantially burdened. *Id.* at 2759 (if "heavy" penalties

"do not amount to a substantial burden, it is hard to see what would"). In that case, the Tenth Circuit reached the same conclusion. *Hobby Lobby*, 723 F.3d at 1140 ("Here, it is difficult to characterize the pressure as anything but substantial."). The Tenth Circuit in this case, however, ignored those same costs, evaluating the substantial burden by looking to the ease of violating one's conscience rather than at the degree of governmental coercion to violate it.

Unfortunately, as above, other Circuit Courts have committed the same error the Tenth Circuit committed here when considering the burden imposed by the accommodation scheme. Review by this Court is vital to ensure that courts appropriately evaluate the burdens to be considered in the RFRA analysis.

II. The Court Should Grant Certiorari Because The Tenth Circuit's Flawed Interpretation Of RFRA Could Have Sweeping, Detrimental Consequences On Religious Liberty If Upheld

A. The Tenth Circuit's Substantial Burden Analysis Revises Recognized Protections Of Free Exercise With An Approach By Which Courts Could Question Any Sincerely Held Belief

Courts have consistently refrained from evaluating the merits and validity of sincerely held religious beliefs, finding in a variety of contexts that the federal judiciary has "no business" addressing this question. *Hobby Lobby*, 134 S. Ct. at 2778; *see also Smith*, 494 U.S. at 887 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."); *Thomas*, 450 U.S. at 716 (courts do not question "whether the petitioner ... correctly perceived the commands of [his or

her] faith"). This judicial restraint is particularly important with regard to review of regulatory schemes and their effects on religious beliefs, since "many people hold beliefs alien to the majority of our society—beliefs that are protected by the First Amendment but which could easily be trod upon under the guise of 'police' or 'health' regulations reflecting the majority's views." *Sherbert*, 374 U.S. at 411 (Douglas, J., concurring).

The Tenth Circuit's approach to evaluating the burden on Petitioners in this case invites that forbidden inquiry. Although the court found Petitioners' beliefs "'sincere,'" it held that the accommodation "relieves Plaintiffs of their obligation" and would therefore not violate their religious beliefs. Pet. App. 18a, 54a. This method of analysis encourages courts to consider the relative quality of religious beliefs rather than the depth of the burden that the regulation would impose—an approach that intrudes into previously inviolable matters of faith. Applied to recent cases involving free exercise—where the burdened religious belief was unquestioned—the resulting modified assessment could lead to a different outcome. *E.g.*, *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 425 (2006) ("receiving communion through *hoasca*," a sacramental tea and a Schedule I controlled substance, was "[c]entral to the [religion's] faith"); *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 524 (1993) (finding, without inquiry, that "one of the principal forms of devotion [in the Santeria religion] is an animal sacrifice").

In contrast to the reasoning below, relevant considerations for a substantial burden analysis cannot consist only of the activity that a regulation mandates or proscribes, but must include the potential penalty for

refusing to abide by the regulation. To do otherwise is to weigh only part of the relevant effect. If judicial deliberation addresses only the regulatory requirement, which may seem objectively minimal, courts will increasingly be placed in a position of estimating the burden imposed solely by *compliance* with the regulation itself rather than the consequence of adherence to religious beliefs in *contravention* of the regulation. Such analysis ignores the impossible choice that burdensome regulations present—one must violate his or her religious beliefs or be subject to potentially severe penalties. *See Holt*, 135 S. Ct. at 862. Moreover, the step between assessing the burden on religious belief due to compliance with the regulatory requirement, and a deeper focus on the religious belief itself, is a short one—as this case demonstrates.

Thus, continued judicial application of a substantial burden analysis that focuses entirely on the regulatory action required, or prohibited, rather than focusing on the consequences when adherents act according to their beliefs and contrary to the regulation, is both flawed and dangerous. Such an approach opens the door for an inquiry that courts have consistently resisted. *E.g.*, *Hobby Lobby* 134 S. Ct. at 2778 ("Arrogating the authority to provide a binding national answer to this religious and philosophical question, [the government] in effect tell[s] the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step."); *Smith*, 494 U.S. at 887. In determining whether a substantial burden exists, courts could use the reasoning of the court below to question any and all sincerely held beliefs, potentially "rul[ing] that some religious adherents misunderstand their own religious beliefs." *Lyng*, 485 U.S. at 458.

B. The Court Should Clarify That "Accommodations" Must Be Treated The Same Way As Other Laws Challenged Under RFRA Because The Decision Below Could Incentivize Regulators To Add "Accommodations" That Do Not Truly Serve The Interests Of Those Who Seek To Exercise Their Religious Beliefs

Because the Tenth Circuit misconstrued the test under RFRA, resulting in its holding that the "accommodation" did not substantially burden Petitioners, the Court should clarify that a religious accommodation is subject to the same heightened standard of review as any law challenged under RFRA. Otherwise, the Tenth Circuit's decision could incentivize regulators to create similar religious "accommodations" that do not accomplish RFRA's goal of preserving religious liberty.

A religious believer's ability to act freely in accordance with her religious beliefs is of utmost importance. Indeed, "[f]ree exercise ... implicates more than just freedom of belief. It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community." *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring) (citation omitted). Religious exemptions are critical to protecting this right to practice one's religion. This country has had a tradition of providing religious exemptions dating back to early America when certain religious objectors, predominantly Quakers, were exempted from taking oaths, military conscription, and removing their hats in court. *See* McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1466-1473 (1990). Since *Roe* v. *Wade* was decided in 1973, Congress has passed numerous laws granting exemptions to those who object to abortion on

the basis of a religious belief, such as the Church Amendment, which prevents hospitals receiving federal funds from forced participation in abortion or sterilization. 42 U.S.C. § 300a-7. Responding to the Supreme Court's decision in *Smith*, Congress enacted RFRA, recognizing "free exercise of religion as an unalienable right" and affirming its conviction that "governments should not substantially burden religious exercise without compelling justification." *Id.* § 2000bb(a)(1), (3). Thus, exemptions and legitimate accommodations for religious reasons are an indelible part of this country's tradition of protecting religion.

Despite the importance of exemptions for religious liberty, HHS chose to create a so-called "accommodation" that is not in fact an accommodation, but an alternative way to comply with the mandate. 79 Fed. Reg. 51,092, 51,092 (Aug. 27, 2014); 78 Fed. Reg. 39,870, 39,870 (July 2, 2013). The Tenth Circuit's flawed analysis of this purported "accommodation" under RFRA led to the incorrect conclusion that the "accommodation" adequately protects Petitioners' religious liberty, when in fact, it does not. Petitioners sincerely believe that under the accommodation scheme, they are participating in the provision of contraceptive coverage, which violates their religious beliefs. The court's reasoning seems based, in part, on the law's designation as an accommodation. Without full and appropriate consideration of an accommodation's substantial burden, a person with strong adherence to her beliefs is left with the same false choice as a direct regulation provides. The mandate's so-called "accommodation," therefore, has the perverse effect of curbing religious liberty.

As a result of the Tenth Circuit's incorrect analysis under RFRA of the "accommodation," regulators may resort to including similarly ineffective "accommoda-

tions" in regulatory regimes burdening religion that could not be successfully challenged in court. Such accommodations-in-name-only would not serve the important interests in protecting religious liberty that have been recognized by Congress and this Court. Indeed, the decision to create a separate and distinct "accommodation" for non-church religious organizations demonstrates the government's willingness to pursue its goals without using the least restrictive means available to accomplish them. While a sincere intent to protect religious freedom should be lauded, an "accommodation" similar to the one created by HHS is like a wolf in sheep's clothing. The Tenth Circuit's decision, as it stands, could establish a precedent detrimental to religious liberty by diluting the demanding substantial burden test and undermining the purpose of RFRA, which is to "ensure that interests in religious freedom are protected." *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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